

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

BOOK PEOPLE, INC., ET AL*

* September 11, 2023

VS.

*

* CIVIL ACTION NO. 1:23-CV-858

MARTHA WONG, ET AL

*

BEFORE THE HONORABLE ALAN D ALBRIGHT
MOTIONS HEARING (via Zoom)

APPEARANCES:

For the Plaintiff: Laura Lee Prather, Esq.
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William Reid Pillifant, Esq.
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Proceedings recorded by mechanical stenography,
transcript produced by computer-aided transcription.

03:00 1 (Hearing begins.)

03:00 2 DEPUTY CLERK: A civil action in Case
03:00 3 1:23-CV-858, Book People, Inc., et al., versus Martha
03:00 4 Wong, et al. Case called for a motions hearing.

03:00 5 THE COURT: Ms. Prather, announcements
03:01 6 from counsel?

03:01 7 MS. PRATHER: Good afternoon, Your Honor.
03:01 8 Laura Prather here along with Michael Lambert and Reid
03:01 9 Pillifant on behalf of the plaintiffs.

03:01 10 THE COURT: Welcome.

03:01 11 MS. CELLA: Good afternoon, Your Honor.
03:01 12 Christina Cella and Amy Pletscher on behalf of the
03:01 13 defendants. And a few of my clients are on the call as
03:01 14 well.

03:01 15 THE COURT: Well, welcome to them as
03:01 16 well.

03:01 17 I'm not sure which of you to start with
03:01 18 today, but I think I'll probably start with you,
03:01 19 Ms. Cella, because the purpose of today's hearing is to
03:01 20 deal with your concerns that what I did orally -- and
03:01 21 we're going to get the order in this week, so that's
03:01 22 going to be -- that part of it will be taken care of --
03:01 23 but the -- your concern about the breadth of the
03:01 24 injunction.

03:01 25 And so why don't you give me an idea, on

03:01 1 the record, of what you believe should be excluded from
03:02 2 the order assuming it's consistent with the idea that I
03:02 3 don't believe that it is constitutional for the State
03:02 4 to be imposing the burdens that they are on the
03:02 5 plaintiffs and third parties.

03:02 6 But if there are -- I don't mean to be
03:02 7 (inaudible) when I say "bureaucratic." If there are
03:02 8 things that are -- that need to be done by the TEA or
03:02 9 by some state agency that don't impose a burden on the
03:02 10 plaintiffs, that's really what I'm hoping you can set
03:02 11 out for me so I can -- I definitely want to tailor the
03:02 12 injunction in a way to only have it apply to protect
03:02 13 the plaintiffs.

03:02 14 But of course, I'll hear their point of
03:02 15 view after you chat.

03:02 16 MS. CELLA: Thank you, Your Honor.

03:02 17 Yes. So as you're aware, we don't think
03:02 18 any of it should be enjoined. But as it pertains only
03:02 19 to the state agencies' portion, there are specific
03:03 20 timelines that the state agencies, mainly TSLAC on the
03:03 21 forefront and then the State Board of Education on the
03:03 22 back end of that, but TSLAC needs to consider standards
03:03 23 for a proposal standards and guidelines.

03:03 24 Some of that relates to books being rated
03:03 25 as sexually explicit, but some of it just has to do

03:03 1 with overall standards.

03:03 2 And as you're, I'm sure, aware of the
03:03 3 administrative procedure, proposed rules need to be
03:03 4 published in the Texas Register, and then TSLAC needs
03:03 5 to propose these standards as well to the State Board
03:03 6 of Education. And things just need to be approved on
03:03 7 the State end that don't entirely involve the
03:03 8 plaintiffs' rating of books.

03:03 9 THE COURT: Well, let me amend -- let me
03:03 10 try and make sure I understand. Again, the line I
03:03 11 see -- and I'll hear from Ms. Prather because I may not
03:04 12 have it completely right.

03:04 13 But the way I see the line is
03:04 14 administrative actions that you need to take -- that
03:04 15 the State needs to take that have no impact on the
03:04 16 plaintiffs, I'm probably -- I'm considering allowing
03:04 17 those to continue, you know, where the plaintiff can't
03:04 18 show any harm or potential prejudice.

03:04 19 And so can you -- as best you can, if you
03:04 20 identify specifically maybe from the statute itself.
03:04 21 And so what -- if you could help me out by telling me
03:04 22 exactly what it is that you want me not to enjoin and
03:04 23 that way Ms. Prather can tell me what she thinks about
03:04 24 that.

03:04 25 MS. CELLA: Do you want the specific

03:04 1 section numbers, or how do you want me to go through?

03:05 2 THE COURT: I think that'd be the best
03:05 3 way so there's no -- if you tell me the specific
03:05 4 section numbers, then we can identify those in the
03:05 5 order either -- I guess maybe the injunction does not
03:05 6 cover this type of thing or whatever.

03:05 7 And also, that'll help Ms. Prather
03:05 8 identify specifically what she needs to respond to
03:05 9 about why, in her opinion, if she has an opinion, they
03:05 10 would be included in the injunction.

03:05 11 MS. CELLA: Okay. So I don't have -- you
03:05 12 know, I have the bill in front of me and I know what it
03:05 13 says. I don't have the specific section numbers off
03:05 14 the top of my head that would pertain to my clients. I
03:05 15 can either send that to you after this in a quick --

03:05 16 THE COURT: Okay. Let's do this then.
03:05 17 Why don't you run through with as much specificity as
03:05 18 you can the -- I always say buckets -- the specific
03:05 19 State action -- the specific procedures you would like
03:05 20 the State to be allowed to continue to take because, in
03:06 21 your opinion, they don't prejudice the plaintiff by me
03:06 22 allowing you to continue doing.

03:06 23 And then I think it -- then I'm perfectly
03:06 24 fine with you sending Ms. Prather and the Court a list
03:06 25 of specifically which sections those are identified in.

03:06 1 MS. CELLA: Sure.

03:06 2 So it is mainly the -- and again, I don't
03:06 3 want to keep harping on this, but we don't think any of
03:06 4 it should be enjoined.

03:06 5 But the portions that pertain
03:06 6 specifically to the State are the guidelines that TSLAC
03:06 7 needs to develop and then the State Board of Education
03:06 8 needs to approve or not approve. But those come up for
03:06 9 vote by the State Board, but TSLAC does develop them.
03:06 10 And I don't think that that would prejudice the
03:06 11 plaintiffs in any way.

03:06 12 THE COURT: Ms. Prather, do you have a
03:06 13 response to that?

03:06 14 MS. PRATHER: Yes, Your Honor. I do.

03:06 15 We actually believe very strongly that
03:07 16 the bill in its entirety needs to be enjoined. And
03:07 17 really, there's three reasons for that.

03:07 18 We sought the injunction of HB 900 in its
03:07 19 entirety because the unconstitutional definitions that
03:07 20 have been discussed at the prior hearings permeate the
03:07 21 statute. And in fact, the very beginning of the
03:07 22 library standards section, which is the section that
03:07 23 opposing counsel is focusing on not being stayed, is
03:07 24 the definition of sexually explicit material. That's
03:07 25 in 33.021(a).

03:07 1 And that right there is one of the big
03:07 2 discussion points that we've had about the
03:07 3 unconstitutionally vague and overbroad definitions.

03:07 4 We also -- and I'll go into more detail,
03:07 5 but three basic things.

03:07 6 One, these unconstitutional definitions
03:07 7 permeate the statute.

03:08 8 Two, all of HB 900 is linked such that a
03:08 9 partial injunction would actually invade the
03:08 10 legislative process.

03:08 11 Here, the legislature did not include a
03:08 12 severability provision. They do that all the time.
03:08 13 They did it in more than 500 bills this session they
03:08 14 didn't hear, which then implies that there should be no
03:08 15 severability.

03:08 16 And, third, because the preliminary
03:08 17 injunction, the purpose is to maintain the status quo,
03:08 18 there already are library standards on the books.
03:08 19 Those library standards have been in place for decades.
03:08 20 They were most recently amended five years ago, and
03:08 21 those library standards can continue to be used while
03:08 22 this case is apparently going to be taken up to the
03:08 23 Fifth Circuit.

03:08 24 Now, I would like to go into a little
03:08 25 more detail on each of those points if it's okay, Your

03:08 1 Honor?

03:09 2 THE COURT: Yes, please.

03:09 3 MS. PRATHER: So as I said, we sought in
03:09 4 our pleadings a stay in its entirety. We did that with
03:09 5 the pleadings and we did that with the selection of the
03:09 6 defendants.

03:09 7 As you saw, we included as a defendant
03:09 8 the TSLAC commissioner and the Texas Board of Education
03:09 9 chair in part because of their role in developing the
03:09 10 library standards.

03:09 11 In addition, under this bill, the
03:09 12 development of those library standards, the library
03:09 13 collection development, under 33.021 are mandatory.
03:09 14 Those are mandatory provisions that they would be
03:09 15 issuing now while you'd have a preliminary injunction
03:09 16 in place requiring school districts to adhere.

03:09 17 So 33.021(a) has that constitutionally
03:09 18 infirm definition of sexually explicit; 33.021(b) says
03:10 19 that: The standards that are going to be developed by
03:10 20 TSLAC are mandatory; (c) says requires that the school
03:10 21 districts shall adhere to these standards; and (d) sets
03:10 22 forth what must be included in these standards. And in
03:10 23 what must be included in these standards are the
03:10 24 constitutionally infirm issues.

03:10 25 And so by allowing them to go forward

03:10 1 with the standards, you're basically eviscerating the
03:10 2 preliminary injunction that you would be putting in
03:10 3 place.

03:10 4 The standards would immediately impact
03:10 5 the possession of books in the library. So it's not
03:10 6 just ratings. It talks about, under this policy, it
03:10 7 would prohibit the possession. So you'd have books
03:10 8 taken off the shelf, existing books taken off the
03:10 9 shelves. It would -- prohibits possession,
03:11 10 acquisition, and purchase.

03:11 11 So it directly impacts our clients and it
03:11 12 directly impacts the First Amendment protections that
03:11 13 they are protecting not just for themselves but for
03:11 14 students to have access to information.

03:11 15 This is not dealing with curriculum.
03:11 16 This is dealing with library collection standards, and
03:11 17 those collection standards have to have constitutional
03:11 18 protections in place. That is what the U.S. Supreme
03:11 19 Court has said.

03:11 20 When you look again at that sexually
03:11 21 explicit definition which appears at the very beginning
03:11 22 of the library standards section, that definition is in
03:11 23 the statute more than ten different times. It
03:11 24 permeates the entire statute.

03:11 25 And if you impose these library

03:11 1 standards -- which by the way, I think I heard at the
03:11 2 prior hearings nothing needs to be done until
03:11 3 April 1st. These libraries standards have already been
03:12 4 drafted. The day of our last hearing, the committee
03:12 5 that is considering these standards was looking at a
03:12 6 draft of these standards two hours before our hearing.

03:12 7 So don't think this hasn't already been
03:12 8 done. It has already been done, and it's just not been
03:12 9 mentioned to the Court.

03:12 10 But the imposition of these standards,
03:12 11 once they are imposed, is going to function as an
03:12 12 unconstitutional prior restraint because you will end
03:12 13 up having books removed from public school libraries
03:12 14 based upon these standards without any form of judicial
03:12 15 review.

03:12 16 And that, Your Honor, under the Bantam
03:12 17 Books case is something that is unconstitutional. It
03:12 18 falls short of the constitutional requirements for the
03:12 19 government regulation of obscenity because it reaches,
03:12 20 in this case, as we've already demonstrated,
03:12 21 constitutionally protected works.

03:13 22 That's the first reason not to allow a
03:13 23 partial preliminary injunction.

03:13 24 The second reason is because everything
03:13 25 is intertwined in this bill and that means that it's

03:13 1 not readily susceptible to any sort of partial
03:13 2 injunction.

03:13 3 As I mentioned, we end up having a
03:13 4 situation here where what is being asked of you is to
03:13 5 rewrite the law to try to conform it to constitutional
03:13 6 requirements. And that is actually an invasion of the
03:13 7 legislative process. Under U.S. versus Stevens, that
03:13 8 is not permissible.

03:13 9 There is a provision in here that I want
03:13 10 to flag as well for the Court that is not in the
03:13 11 library standards section that is sort of a "one man
03:13 12 trumps all" provision.

03:13 13 If you look at Section 35.007, in that
03:13 14 provision, it allows the TEA commissioner to adopt
03:14 15 rules as necessary to administer the chapter. It's a
03:14 16 very broad right that it allows the TEA commissioner to
03:14 17 have.

03:14 18 So, again, if the Court just enjoins part
03:14 19 of the statute, it would open the door for the
03:14 20 commissioner to basically circumvent the injunction
03:14 21 through 35.007, which would defeat the purpose of
03:14 22 enjoining the law to begin with.

03:14 23 The failure to include a severability
03:14 24 clause by the legislature, this is not an oversight.
03:14 25 This was an intentional choice.

03:14 1 As I mentioned, 579 bills introduced last
03:14 2 session have severability provisions, including bills
03:14 3 by these same House and Senate sponsors. They chose
03:14 4 not to do that here.

03:14 5 And under Carter versus Carter Coal, a
03:14 6 U.S. Supreme Court decision, that lack of severability
03:15 7 clause actually suggests the inseverability of the
03:15 8 provisions. That omission, in and of itself, suggests
03:15 9 that the provisions are not severable.

03:15 10 Finally, the third point that I'd like to
03:15 11 bring up is the purpose behind a preliminary injunction
03:15 12 to begin with, and that is to maintain the status quo.

03:15 13 Because we already have standards and
03:15 14 guidelines in place -- got them right here, they're
03:15 15 big, thick guidelines that have been in place since
03:15 16 2018, they were originally developed back in 1997 -- it
03:15 17 is not as though there would be no standards for the
03:15 18 libraries to follow. In fact, there are existing
03:15 19 standards.

03:15 20 The problem is if you only partially
03:15 21 enjoin, then you're going to end up with a situation
03:15 22 where constitutionally infirm definitions and processes
03:15 23 that allow for no judicial review, unconstitutional
03:16 24 prior restraints will go into effect. And that will
03:16 25 create a tremendous environment of uncertainty for

03:16 1 people moving forward.

03:16 2 The libraries won't know what to do.

03:16 3 They won't know what to buy. They won't know what to
03:16 4 return. They won't have any guidance. And that, in
03:16 5 and of itself, will then chill the First Amendment
03:16 6 freedoms of the students, of the booksellers, and of
03:16 7 anyone who's trying to access information through
03:16 8 public school libraries.

03:16 9 What we see here is, you know, this is an
03:16 10 unconstitutional law. It's unconstitutional, all four
03:16 11 corners of it, and there is no right to enforce an
03:16 12 unconstitutional law.

03:16 13 If the Court were to allow TSLAC and
03:16 14 others to go forward and develop these regulations
03:16 15 based on unconstitutional definitions and
03:16 16 unconstitutional procedures, then that would be like
03:17 17 wielding the sword of Damocles over booksellers and
03:17 18 students alike because those standards fall prey to the
03:17 19 same constitutional impairments of prior restraint,
03:17 20 vagueness, and overbreadth that we've already talked
03:17 21 about in the prior proceedings.

03:17 22 So we urge the Court to enter an
03:17 23 injunction of HB 900 in its entirety and don't see how
03:17 24 it can be parsed.

03:17 25 THE COURT: A response?

03:17 1 MS. CELLA: Yes. Thank you, Your Honor.

03:17 2 A few things.

03:17 3 Ms. Prather indicated that there are
03:17 4 already standards in place, and that is true. Prior to
03:17 5 this bill even coming out. That is true. So the State
03:17 6 does have the ability to amend standards even if this
03:17 7 bill had not ever come out. So the fact that there are
03:17 8 already standards in place does go towards that.

03:17 9 Another item that Ms. Prather mentioned
03:17 10 was that these are already done and developed. That's
03:17 11 not accurate, and it's not based on any facts.

03:18 12 TSLAC did write a draft. It was nothing
03:18 13 final. They were set to officially propose those
03:18 14 standards on September the 7th. After the hearing last
03:18 15 week, that was immediately stopped and they have not
03:18 16 been proposed. So to say that it's already done is --
03:18 17 it's just flat out incorrect.

03:18 18 And finally, I think, and most
03:18 19 importantly, the harm that plaintiffs are claiming
03:18 20 would occur if this was enjoined in its entirety are
03:18 21 not any harm to the plaintiff.

03:18 22 So the school districts were mentioned.
03:18 23 The students were mentioned. But there's no standing
03:18 24 for Ms. Prather and the -- on behalf of the plaintiffs
03:18 25 to advocate for the school districts or the students.

03:18 1 We've been through that.

03:18 2 And enjoining this partially is not --
03:18 3 there's just not going to be any harm to the
03:18 4 plaintiffs.

03:18 5 And I apologize. I accidentally left my
03:18 6 video off, which it is back on now.

03:19 7 THE COURT: I think you were done, but
03:19 8 I'm not sure. Are you done?

03:19 9 MS. CELLA: I was. Yes.

03:19 10 THE COURT: Ms. Prather, anything else?

03:19 11 MS. PRATHER: Just briefly, Your Honor.

03:19 12 There is certainly standing for the
03:19 13 booksellers and the plaintiffs in this case to bring
03:19 14 this argument concerning the library standards.

03:19 15 As I mentioned, this library standards
03:19 16 deal with the prohibition of possessing books,
03:19 17 possessing books that my clients have provided to
03:19 18 libraries, it's also dealing with the acquisition and
03:19 19 purchase of books that my clients would be selling to
03:19 20 the libraries.

03:19 21 In addition, as we've previously
03:19 22 mentioned, under Virginia versus American Booksellers
03:19 23 and other cases, my clients do have the right and have
03:19 24 brought this action, in addition, on behalf of those
03:19 25 third parties whose right to receive information will

03:19 1 be violated, and that certainly would be impacted by
03:19 2 the imposition of these library standards at this time.

03:20 3 THE COURT: I'll be back in just a
03:20 4 second.

03:20 5 (Pause in proceedings.)

03:23 6 THE COURT: Okay. If we could go back on
03:23 7 the record.

03:23 8 Is there anything else either counsel
03:23 9 would like to raise before -- we'll include in our
03:23 10 order what we're going to do. Is there -- and that
03:23 11 will be out this week.

03:23 12 Is there anything else we should include
03:23 13 in the order?

03:23 14 MS. CELLA: No, Your Honor.

03:23 15 THE COURT: You want us to include in the
03:23 16 order.

03:23 17 MS. CELLA: No, Your Honor.

03:23 18 THE COURT: Ms. Prather?

03:23 19 MS. PRATHER: No, Your Honor.

03:23 20 THE COURT: Thank you all for being here.
03:23 21 Have a good day.

03:23 22 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
7 District of Texas, do certify that the foregoing is a
8 correct transcript from the record of proceedings in
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10 I certify that the transcript fees and
11 format comply with those prescribed by the Court and
12 Judicial Conference of the United States.

13 Certified to by me this ^ day of
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15
16 /s/ Kristie M. Davis
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